IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-241, 77-242, 77-243

COMMUNICATIONS WORKERS OF AMERICA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
UNITED STATES OF AMERICA,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
Respondents,

TELEPHONE COORDINATING COUNCIL TCC-1,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR AMERICAN TELEPHONE AND TELEGRAPH COMPANY *ET AL.* IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals below, set forth in the Joint Appendix to the Petitions (Pet. App. 1a-29a), is officially reported at 556 F.2d 167 (3d Cir. 1977). The opinion of the district court for the Eastern District of Pennsylvania, also set forth in the Appendix to the Petitions (Pet. App. 35a-118a), is reported at 419 F. Supp. 1022 (E.D. Pa. 1976).

JURISDICTION

The judgment of the court of appeals below was entered on April 22, 1977, and a timely petition for rehearing was denied on May 16, 1977. The petitions for writs of *certiorari* were filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can a district court grant relief to a class under Title VII of the Civil Rights Act of 1964?

2. Is it permissible to forego determinations of individual entitlement under Title VII of the Civil Rights Act of 1964 in favor of a judicially approved settlement providing class relief?

3. Is the equitable authority of the district court to fashion the most complete relief possible under § 706 (g) of the Civil Rights Act of 1964 circumscribed by § 703(h) of the Act which protects bona fide seniority systems?

4. Do the expectations of individual employees under a collective bargaining agreement preclude a district court from approving Title VII relief that is otherwise appropriate?

STATUTES INVOLVED

Sections 703(a), 703(h), 703(j) and 706(g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.;* Executive Order 11246; and the Fifth Amendment to the Constitution of the United States, are set out in pertinent part in the Addendum to the Petition in No. 77-242.

STATEMENT OF THE CASE

A. Summary of Proceedings Below

On January 18, 1973, the Equal Employment Opportunity Commission (EEOC), the Secretary of Labor, and the United States of America (together the "Government parties"), filed a Complaint against the American Telephone & Telegraph Company and its operating subsidiaries (the "Bell Companies"), charging them with violations of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, Executive Order 11246, 3 C.F.R. 169, and the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* The Bell Companies answered the Complaint, denying its allegations. The Consent Decree challenged here was submitted to the trial court and approved after a hearing.

The Government parties and the Bell Companies agreed to the Consent Decree after two years of pre-complaint investigation, administrative proceedings and negotiations. The allegations contained in the Complaint were first raised by the EEOC in December 1970, in a rate proceeding before the Federal Communications Commission (FCC). The FCC soon thereafter initiated a special proceeding to consider these allegations.

During the course of the adversary proceeding before the FCC in this matter, a number of civil rights organizations intervened in support of the EEOC. Sixty days of hearings were held and more than 8,000 pages of testimony and records regarding the Bell Companies' employment practices were introduced by the EEOC. *EEOC* v. *AT&T*, 365 F. Supp. 1105, 1109 (E.D. Pa. 1973). Concurrently with the FCC proceeding, extensive negotiations between the Government parties and the Bell Companies were held, leading ultimately to the filing of the Complaint in the district court, the parties' agreement to entry of the Consent Decree, and the agreement of all parties and intervenors to terminate the FCC proceeding. Throughout this period, the Communications Workers of America ("CWA"), which represents by far the largest number of the Bell Companies' 600,000 non-management employees, declined to participate in the settlement discussions, despite repeated invitations to do so. 506 F.2d 735, 741 (3d Cir. 1974).

Shortly after the entry of the Decree, CWA sought to intervene. Intervention was denied by the district court, except as to an issue unrelated to these Petitions. *EEOC* v. *AT&T*, 365 F. Supp. 1105 (E.D. Pa. 1973). On appeal, the Third Circuit permitted CWA to intervene for the purpose of seeking modification of those portions of the Consent Decree that modify or invalidate provisions of its collective bargaining agreement with the Bell Companies. 506 F.2d 735 (3d Cir. 1974). CWA, and subsequently the Telephone Coordinating Council TCC-1, International Brotherhood of Electrical Workers ("IBEW") and the Alliance of Independent Telephone Unions ("the Alliance"), sought and were granted leave to intervene by the district

court for that purpose. Simultaneously, the unions requested the district court to modify the Consent Decree. CWA also sought a preliminary injunction to halt the operation of the Decree pending disposition of its petition for modification; IBEW subsequently moved for summary judgment on the issues raised in its petition.

During the course of these proceedings, the Government parties and the Bell Companies jointly moved the district court to enter a Supplemental Order.[1] This motion was opposed by the unions.

On August 20, 1976, the district court denied the unions' petitions to modify the Consent Decree and IBEW's motion for summary judgment, dismissed as moot CWA's motion for a preliminary injunction, and granted the request by the Government parties and the Bell Companies to enter the proposed Supplemental Order. 419 F. Supp. 1022. CWA and IBEW unsuccessfully sought a stay in the district court pending appeal. All three unions applied unsuccessfully to the Third Circuit for a stay.

The unions' appeal was heard by a panel of the Third Circuit which unanimously affirmed the decision of the district court. A motion by IBEW for a rehearing *en banc* was denied (Pet. App. 32a), as was a later motion by CWA for a stay.

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[1] The Supplemental Order provided some temporary measures intended to compensate for alleged deficiencies in the achievement of certain hiring and promotion targets in certain establishments during the first years of the Decree. These measures generally expired on December 31, 1976. Thus, the issues raised below regarding the Supplemental Order should now be deemed moot.

B. Consent Decree Provisions At Issue

Under the Consent Decree, the Bell Companies are directed to establish goals and intermediate targets to promote full utilization of all race, sex and ethnic groups in each job classification. Intermediate targets are set each year to reflect the representation of those groups in the external labor market and within relevant promotion pools in each operating company's work force. When any Bell Company is unable to achieve or maintain the intermediate target rate by applying normal contract selection standards—best qualifications and seniority [2]—it is required to use an affirmative action "override" to limit those considered for selection under the contract standards to *qualified* candidates of the targeted underutilized race or sex group.

The Decree provides for periodic adjustment in the goals and targets.[3] In addition, annual placement rates for members of underutilized groups are redetermined each year, based upon the current availability of such persons in the relevant internal labor pools. Finally, the share of promotion vacancies targeted for an underutilized group in any job class is gradually reduced

[2] Under these standards, candidates are evaluated on the basis of relative qualifications and net credited service (company seniority). While company seniority governs the selection when two or more candidates for promotion have substantially equal qualifications, job vacancies under the labor agreements have traditionally been filled primarily on the basis of relative or "best" qualifications. *See* 419 F. Supp. at 1037. The override may be exercised "only when necessary to bring particular work units into compliance" with the Companies' obligations. 556 F.2d at 178.

[3] Several modifications of the goal-setting procedure were approved by the district court in February 1977.

as the percentage of utilization of that group increases.[4]

The Consent Decree affirms the intention of all parties that the contractual provisions of the collective bargaining agreements will not be affected, except as required to assure compliance with federal law. Decree, Part B, § II.D. For layoff, recall and all other purposes, the seniority provisions of the applicable collective bargaining agreement control. Decree, Part A, § III.C.

The life of the Decree is limited to six years. Part B, § IV. It will expire on January 17, 1979, and the use of the override will terminate on that date.[5]

ARGUMENT

A. REVIEW OF THE DISTRICT COURT'S DISCRETION IN APPROVING THE RELIEF PROVIDED IN THIS CASE IS UNNECESSARY

In a school desegregation case, *Green* v. *County School Board*, 391 U.S. 430, 439 (1969), this Court noted that

[4] For example, a group whose current utilization is less than 50% of its availability receives a share equal to 200% of its availability, while a group whose current utilization is at 80% or more of its availability has a share equal to 100% of its availability. When 90% of full utilization is achieved, use of the override is discontinued for that group.

[5] Since the Companies' post-consent Decree obligations will be determined pursuant to Executive Order 11246, any goals that may be required will be based on what is reasonably attainable through good faith efforts. 41 C.F.R. § 60-2.12. Thus, in the absence of the override, any goals that may be formulated in the post-Decree period under the Executive Order will necessarily reflect substantial reductions from current levels. The relationship between the level of the goals and the need to use the override to meet targets set under the Decree is recognized in those provisions of the Supplemental Order calling for revision of goals if use of the override were enjoined. Supplemental Order, Part IV.B.

> [t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance.

In its extensive analysis of the terms of the 1973 Consent Decree,[6] the district court made such an assessment, focusing on the override remedy that is the subject of the unions' challenge. After examining all facets of the relief incorporated in the Decree,[7] the court satisfied itself that the override and the targets and goals it is designed to implement constitute an appropriately tailored remedy, intended to operate for a limited period of time—6 years—with the minimum possible intrusion upon the expectations of other employees. It is not an "across-the-board" remedy and does not operate in the vast majority of job placements.[8] In no situation does it extend an absolute preference for promotion to members of underutilized groups.[9] Nor does it provide remedial seniority to any individual.

The reasonableness of the override remedy depends in part, of course, on the reasonableness of the targets to which it relates. The district court recognized this and recited with approval the factors considered in

[6] The opinion was issued in 1976, following the unions' intervention.

[7] 419 F. Supp. at 1054-55. See p. 16, *infra*.

[8] In 1976, the override was used in 4041 out of 56,075 placements in job classes 5-15, *i.e.* 7.2%.

[9] Even under the Supplemental Order, an absolute preference for certain groups was only given during a 60 day period and then only to make up for the operating Companies' alleged deficiencies in meeting targets during the first year under the Decree.

formulating the separate goals for each race/sex/ethnic group, for each job class, in each establishment of each operating company.[10] On this basis, it concluded that the relief provided by the Consent Decree was reasonable and consistent with the purposes of Title VII and Executive Order 11246. The district court's opinion leaves no doubt that the "transcendent legislative purposes" [11] of Title VII were uppermost in its mind and guided its judgment. Moreover, as indicated below,[12] the judgment is consistent with both the dictates and prohibitions of the law. Thus, the district court fulfilled its responsibility to exercise its discretion in accordance with the "meaningful standards" that govern the application of Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975). While this does not foreclose appellate review, it suggests that the standards this Court prescribed in *Albemarle* have been fully satisfied here.

This Court has described the equitable power of the district court as the authority to fashion relief according "to the necessities of the particular case." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). It has lately endorsed that proposition again in *Milliken* v. *Bradley*, 97 S. Ct. 2749, 2760-61 (1977). Similarly, in *Franks* v. *Bowman Transportation Co.*, the Court acknowledged "that there may be cases calling for one remedy but not another." 424 U.S. 747, 779 (1976); citing *Albemarle Paper Co., supra*, 422 U.S. at 416.

[10] 419 F. Supp. at 1045. Currently, there are 14 job groups for which race/sex/national origin goals have been set in each of 274 establishments of the operating companies. Thus, there are approximately 10,000 targets now in existence.

[11] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

[12] See pp. 11-17, *infra*.

Although the district court does not have a free hand to dispense its own brand of justice, it was vested by Congress with "broad equitable powers" under Title VII " 'to make possible the fashion[ing] [of] the most complete relief possible . . . .' " *International Brotherhood of Teamsters* v. *United States,* 97 S. Ct. 1843, 1869 (1977), citing *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421 (1975). Its decision as to the appropriateness of a particular remedy should stand, where, as here, it conforms in all respects to the statutory terms and objectives.

The court of appeals below satisfied itself that the mandates and constraints of the law had been observed. The district court's judgment was proper, the Third Circuit ruled, for it reflected "careful consideration to all the union's [sic] objections, and struck an appropriate balance between the integrity of the collective bargaining process and the necessity for effective relief." 556 F.2d at 178. Thus, it recognized that the choice of a remedy in a Title VII case is "left in the first instance to the district courts . . . guided by sound legal principles." *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416 (1975); cited at 556 F.2d at 178.

A grant of *certiorari* by this Court now would only provide petitioners with another forum in which to complain about the scope and particulars of an equitable remedy. The Companies respectfully submit that this should not be the role of this Court. No other purpose would be served—either in the exercise of the Court's supervisorial authority over the lower courts or in defining the appropriate scope of Title VII relief—by review here.

B. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS CONSISTENT WITH THE DECISIONS OF THIS COURT

1. This Court Has Acknowledged That Class Relief Is Permissible Under Title VII

The unions contend that Title VII relief is available only to individuals who demonstrate that they were actual victims of discrimination. On this basis, they argue that there is a conflict between the remedy upheld by the Third Circuit here, which provides relief to classes of individuals,[13] and this Court's decision in *International Brotherhood of Teamsters* v. *United States,* 97 S. Ct. 1843 (1977), which was concerned with "make-whole" relief to individuals. In fact, the opinions deal with two different, but not conflicting, remedies that serve "two distinct congressional purposes implicit in Title VII." *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 783 (1976) (Powell, J., concurring in part, dissenting in part). The foremost objective is "to achieve equal employment opportunity and to remove the barriers that have operated in the past to favor . . . white employees over other employees." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429-30 (1971).

The *Teamsters* decision reiterates the distinction between remedies to individual victims of discrimination for past violation of their rights under Title VII

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[13] The class relief involved here is not affirmative action to overcome societal discrimination, but a remedy to eliminate the effects of the Companies' alleged past practices. *Cf. Regents of the Univ. of Cal.* v. *Bakke,* 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P. 1152 (Cal. 1976), *cert. granted,* 97 S. Ct. 1098 (1977). Although in their Answer the Companies denied the allegations of discrimination, the charges were not contested for purposes of this litigation and were treated as true by the trial court. *See* 419 F. Supp. at 1040.

and prospective relief. *International Brotherhood of Teamsters* v. *United States*, 97 S.Ct. 1843, 1867 (1977). Only the issue of individual entitlement to compensatory relief for past violations was before this Court in that case; the Court's decision on that issue does not preclude prospective injunctive relief such as that ordered here to correct and eliminate the effects of past practices for the benefit of the class. To the contrary, the Court observed in *Teamsters* that "[w]ithout any further evidence" a "finding of a pattern or practice [of discrimination] justifies an award of prospective relief" including any "order 'necessary to ensure the full enjoyment of the rights' protected by Title VII." 97 S. Ct. at 1867. In fact, prospective relief for the class "was incorporated in the parties' consent decree" in *Teamsters*, and was not contested before this Court. 97 S. Ct. at 1867, n.47.

The legitimacy of prospective relief for the class under Title VII has repeatedly been upheld by the various courts of appeals [14] and is fully consistent with the

[14] *See, e.g.*, United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974); Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976). *Cf.* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 950 (1972), brought prior to the 1972 amendments to Title VII under 42 U.S.C. § 1981, which affirmed a class remedy.

prophylactic objective of Title VII endorsed by this Court. *See Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 417; *International Brotherhood of Teamsters* v. *United States, supra*, 97 S. Ct. at 1869. In the instant case, the override remedy serves as the mechanism to implement that objective.

2. Settlement May Provide Alternatives to Determinations of Individual Entitlement to Relief Under Title VII Consistent With The Opinions of This Court

In *Teamsters*, the Court set up an order of proof to determine individual entitlement to relief after a finding of liability. When the plaintiff establishes a *prima facie* case by showing a pattern and practice of discrimination, the Court held, the burden then shifts to the employer to show that a particular individual was not a victim. *International Brotherhood of Teamsters* v. *United States*, 97 S. Ct. 1843, 1866-67 (1977). This approach is inapposite in a settlement context where the employer effectively waives both proof and rebuttal of liability, thereby altering the format of the entire contest. It may become wholly unnecessary to make discrete determinations of individual entitlement.

The court of appeals there rejected the views of a panel it reversed, holding that "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." *Id.* at 330. In discussing the district courts' free exercise of their "broad equitable discretion to devise prospective relief" from discrimination, this Court in *Teamsters* cited approvingly the example of *Carter* v. *Gallagher*. 97 S. Ct. at 1867, n. 47 and 1870, n. 51.

The nature of the relief provided in this Decree reflects the fact that a determination of liability to identifiable victims of discrimination in job assignment or promotion was never attempted.[15] Instead, the "override" aspect of the Decree is premised on the concept of prospective relief to a class. In light of the size of the workforce involved here—over 600,000 nonmanagement employees—and the multitude of issues presented by the EEOC in the FCC hearings, to require that individual determinations of entitlement be made would have extended the proceedings for many years and totally frustrated any settlement of the claims.[16]

While the procedures outlined in *Teamsters* for trial of individual claims may be suitable after the issues as to liability are fully litigated, they would frustrate settlement efforts in many cases if imposed as inflexible requirements once a complaint is filed. The *Teamsters* decision compels no such result.

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[15] A "class" of female and minority employees who might have been subject to discrimination was defined in the Decree. Part A, § VIII.B (Pet. App. 134a-136a). Compensation was provided for those who met the specifications and in fact transferred to certain jobs prior to or under the Decree.

[16] The courts below gave proper deference to the congressionally preferred means of resolving employment discrimination disputes in the most expeditious manner. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Many other courts addressing Title VII consent settlements have done likewise. *See, e.g.*, Patterson v. Newspaper and Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The fact that unions object to settlement does not detract from the desirability of such procedures where, as here, their objections are fully heard and considered.

3. This Court Has Held That Section 703(h) of Title VII Does Not Circumscribe The Relief That a Court May Fashion Under 706(g).

In *Teamsters,* the threshold question was the legality of the seniority system under Title VII. In this case, the legality of the seniority system is not, and never has been, at issue. *See* 419 F. Supp. 1037, n. 15. Indeed, the Decree provides for the continued application of the seniority system in all situations, except to the extent necessary to meet obligations established under the Decree. Decree, Part B, § II.D.

The question presented here is whether the existence of the seniority system circumscribes the scope of the district court's authority under Section 706(g) to frame "the most complete relief possible." 118 Cong. Rec. 7168 (1972), cited in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421 (1975). This Court has already disposed of that question. As it held in *Franks,* and as the Third Circuit declared in this case, "§ 703 [(h)] is not a statutory limitation upon the remedial authority conferred on the district courts by § 706(g)." 556 F.2d at 174, citing *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 761-62 (1976). Accordingly, the override remedy is not foreclosed by Section 703(h) as construed by this Court in *Teamsters.*

4. This Court Has Held That Individuals' Expectations Under A Collective Bargaining Agreement Do Not Preclude Appropriate Title VII Relief

Although this Court has properly attached great importance to the competitive seniority rights and expectations of employees under collective bargaining agreements, it has refused to allow these expectations

to frustrate appropriate relief under Title VII. *See, e.g., Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 766-770, 773-779.

The district court below recognized that the override remedy will disappoint some employees to the extent it delays promotional opportunities they might otherwise have enjoyed sooner."[17] 419 F. Supp. at 1055. The impact of a remedy on the expectations of other employees is the same whether the remedy provides individual or class relief. No less than here, the expectations of innocent employees will be disappointed by the "make whole" relief approved in *Teamsters* for those who were victims of discrimination. Although relief formulated in this case is somewhat different, the principles articulated in *Teamsters* for balancing the interests of innocent parties are relevant to this situation. As stated by this Court, where the implementation of an equitable remedy compromises the expectations of innocent parties, consideration must be given

> " 'to the practical realities and necessities inescapably involved in reconciling competing interests' in order to determine the 'special blend of *what is necessary, what is fair, and what is workable.*' " citing *Lemon* v. *Kurtzman,* 411 U.S. 192, 200, 201 (opinion of Burger, C.J.). 97 S. Ct. at 1875 (emphasis added).

[17] With this in mind, the district court carefully reviewed the justification for the remedy, its manner of operation and its impact. Critical to its assessment was the fact that the remedy would occasion no permanent dislocation in the order of seniority. 491 F. Supp. at 1054-55. The scrupulous efforts made by the parties to avoid the excessive use of the remedy buttressed the district court's conclusion that a proper balance had been struck among the competing rights of employees. *Id.* at 1045.

In *Teamsters,* the Court declined to "strike the balance" itself, concluding that this task is properly that of the trial court. 97 S. Ct. at 1875. In the instant case, the district court properly performed this task, considering what was necessary, what was fair, and what had proved to be workable. Further review by this Court can provide no more.

C. THE DECISION OF THE THIRD CIRCUIT APPROVING THE OVERRIDE REMEDY DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT

As evidence of an alleged conflict among the circuits, Petitioners have pointed to decisions of the Second Circuit in which it refused to uphold promotion quotas as part of remedial orders issued by the lower courts.[18] As the opinions readily reveal, however, the conflict is not a real one.

In one of these cases, *Kirkland* v. *New York Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 97 S. Ct. 73 (1976), the Second Circuit, in fact, *approved* promotion quotas until the promotion examination held to be discriminatory was adequately revised. 520 F.2d at 429-30. The court refused to extend the promotion goal beyond that point, however, because of the meager evidence of discrimination.[19] Accordingly, the Second Circuit stated that

[18] Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Chance v. Board of Examiners, 534 F.2d 1007 (2d Cir. 1976); EEOC v. Local 638, Sheet Metal Workers Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976); Kirkland v. New York Dep't of Correctional Servs., 520 F.2d 420 (2d Cir.), *cert. denied,* 97 S. Ct. 73 (1976).

[19] Specifically, the Second Circuit noted that only one practice—an examination—had been challenged in that case, and the examination itself had been used only during the period since 1970. There was no other evidence of discrimination. 520 F.2d at 428.

"[i]n view of the *limited scope of the issues framed* in this class action and the paucity of the proof concerning past discrimination, we feel that the imposition of permanent quotas to eradicate the effects of past discriminatory practices is unwarranted." 520 F.2d at 428 (emphasis added).

In this case, of course, the record was entirely different. Allegations of discrimination, not contested for purposes of this litigation,[20] covered almost the full range of employment practices of the Companies. The nature of relief appropriate in these circumstances cannot be limited by a decision in a one-issue case where the record was insufficient to merit consideration of the full panoply of remedies available under Title VII.

The Second Circuit's decision in *EEOC* v. *Local 638, Sheet Metal Workers International Association,* 532 F.2d 821 (2d Cir. 1976), is equally inapposite. There the court refused to approve a quota for membership on a three-person apprenticeship committee. 532 F.2d at 830. In order to meet the minority membership 33% quota, one white committee member would have had to be bumped. No such remedy has been provided in the Consent Decree.

The situations in *Acha* v. *Beame,* 531 F.2d 648 (2d Cir. 1976), and *Chance* v. *Board of Examiners,* 534 F. 2d 993, *modified,* 534 F.2d 1007 (2d Cir. 1976), are also distinguishable.[21] First, at issue in these two cases

[20] See n. 16, *supra.*

[21] *Chance* v. *Board of Examiners,* proceeded under 42 U.S.C. § 1981, not Title VII. Nevertheless, the Second Circuit framed and resolved the quota issue consistent with its view of Title VII.

were seniority rights on layoff, not promotion. A layoff poses a situation that is akin to bumping; at stake is employment, not just a higher-level job. For this reason, the Government parties and the Bell Companies explicitly preserved seniority rights on layoff and recall in the Consent Decree.[22]

Moreover, the seniority system itself was challenged in *Beame,* as in *Teamsters.* Neither case presented a situation, like the one here, where it was necessary to compromise seniority rights for promotion to a limited extent in order to effectuate otherwise appropriate class relief under § 706(g). In short, the *Beame* case suggested no limitations on the means that may be necessary to achieve the "prophylactic" objective of Title VII endorsed by this Court.

Petitioner IBEW argues that there exists a further conflict between the Third Circuit's decision here and the Fifth Circuit's decision in *Myers* v. *Gilman Paper Corp.,* 544 F.2d 837 (1977). In *Gilman,* the court of appeals vacated a consent decree between the employer and certain minority employees which unnecessarily impinged upon terms of a collective bargaining agreement, since there had been no finding that the modifications were necessary to effect complete relief. 544 F. 2d at 855. Quite the contrary is true here, for the seniority override is essential if the Companies are to attain the remedial targets and goals provided for in the Decree. 419 F. Supp. 1022, 1043 (E.D. Pa. 1976). On this basis alone, the analogy between *Gilman* and this case fails.[23]

[22] Decree, Part A, § III.C.

[23] In addition, the unions whose agreements had been modified by the terms of the consent decree in *Gilman* had previously made a

D. THIS CASE DOES NOT PRESENT THE ISSUE OF THE SCOPE OF EXECUTIVE ORDER 11246

Notwithstanding CWA's argument,[24] the decision of the court of appeals below presents no novel issue under Executive Order 11246 for this Court to consider. Issues concerning the relationship between Title VII and Executive Order 11246 or the scope of authority under the Executive Order itself do not arise here since the relief ordered in this case is authorized by Title VII. Thus, it is not necessary to decide whether the Executive Order expands the nature of the relief the Government may seek for individuals or a class previously discriminated against.

Nothing in the Third Circuit's opinion on this point is controversial. Its reaffirmation of the Government's interest under the Executive Order in assuring "utilization of all segments of society in the available labor pool for government contractors" is not in doubt. 556 F.2d at 175, citing *Contractors' Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971). No decision of any court suggests otherwise.

"serious attempt" to come into compliance with the law; this attempt, said the court, should not be disregarded in imposing a settlement. 544 F.2d at 857. The unions here stand in quite a different posture, since, as the courts below found, they disdained to participate in the negotiations leading to settlement. *See* 506 F.2d 735, 741 (3d Cir. 1974) and 365 F. Supp. 1105, 1109-10 (E.D. Pa. 1973).

[24] CWA Petition at pp. 12-15.

F. THE CONSTITUTIONAL ISSUES RAISED ARE SUBSUMED BY THE DISPOSITION OF THE TITLE VII QUESTIONS

CWA's constitutional argument is a warmed-over version of its objections under Title VII to the goals and targets provided in the Consent Decree.[25] It aired these objections in both courts below, but its contentions were rejected for the sound reason that these measures were essential to full relief under Title VII. *See* 419 F. Supp. at 1063.

This Court has recognized that employers may be held to more rigorous standards of non-discrimination under Title VII than under the Constitution. *Washington* v. *Davis,* 426 U.S. 229, 238-39 (1976). Thus, to resolve the Title VII questions above is to dispose of the constitutional issues as well. In any event, the overwhelming support of the courts of appeals for the use of temporary, remedial preferences under Title VII and the Constitution reinforces the judgment of the court below that the relief fashioned here does not overstep constitutional limitations.[26]

The fact that promotions and seniority rights, rather than initial hiring decisions, are at stake does not expand the dimensions of the constitutional issue. As stated in *Franks,* "[t]his Court has long held that employee expectations arising from a seniority system agree may be modified by statutes furthering a strong

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[25] IBEW apparently agrees with this view, conceding that the issues may be disposed of under Title VII. IBEW Petition at 18-19, n. 20.

[26] *See* Rios v. Steamfitters Local 638, 501 F.2d 622, 628-30 (2d Cir. 1974) and cases cited therein. *See also* cases cited in n. 14, *supra.* The decisions of the Second Circuit which CWA alleges present a conflict on this question have been distinguished at pp. 17-19, *supra.*

public policy interest." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 (1976). Given this holding, the due process claim asserted in the CWA's petition evaporates.

VI. CONCLUSION

The override remedy at issue here is provided by the Consent Decree entered on January 18, 1973. It will terminate on January 17, 1979, little more than a year hence. The terms of the Decree, including the override, were approved by the district court and upheld by the court of appeals. For the reasons stated above, Respondents AT&T, *et al.* respectfully request that the Court deny the unions' petitions to review the Third Circuit's decision.

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